(3)

SEP 24

IN THE

Supreme Court of the United States

October Term 1941

No. 537

A. ATWATER KENT,
Petitioner,

v.

WALTER J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
THOMAS G. HAIGHT,
LEIGHTON P. STRADLEY,
MAURICE T. MOORE,
J. MARVIN HAYNES,
CHESTER J. McGUIRE,
GEORGE G. TYLER,
Counsel for Petitioner.

SUBJECT INDEX

PAGE

I. The writ should not be denied because of the cases cited by the respondent as being in accord with the decision of the Circuit Court of Appeals below 1

II. The writ prayed for should be granted because of confusion existing as to the meaning of the decision of this Court in *Helvering* v. *Clifford* (309 U. S. 331),which confusion is indicated by the respondent's announced intention to contend that the petitioner is taxable on the income of the trust here involved by virtue of Section 22 (a) of the Revenue Acts of 1932 and 1934 5

Conclusion 7

Table of Citations

Altmaier v. Commissioner, 116 F. (2d) 162 1–3

Commissioner v. Branch, 114 F. (2d) 985 5–6
Commissioner v. Dean, 102 F. (2d) 699 4

Graff v. Commissioner, 117 F. (2d) 247 1–3

Helvering v. Clifford, 309 U. S. 331 5
Helvering v. Palmer, 115 F. (2d) 368 5–6

Kaplan v. Commissioner, 66 F. (2d) 401 1–2

IN THE

Supreme Court of the United States

October Term 1941

No. 537

A. ATWATER KENT,
Petitioner,

v.

WALTER J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

I.

The writ should not be denied because of the cases cited by the respondent as being in accord with the decision of the Circuit Court of Appeals below.

The respondent states on page 6 of his brief that *Kaplan* v. *Commissioner* (66 F. (2d) 401), *Altmaier* v. *Commissioner* (116 F. (2d) 162), and *Graff* v. *Commissioner* (117 F. (2d) 247) are to the effect that "The fact that the happening of a contingency (such as the death of the grantor before the period of distribution) may prevent him from receiving the accumulated income does not change the operation of Section 167 (a) (1)."

In the first place the petitioner's right, in the case at bar, to receive the accumulated income which has been taxed to him did not depend solely, as the respondent implies, upon his being alive at the time of distribution. That right depended also on the amounts of income distributed to his children during the year preceding the time of distribution. Contrary to the last sentence on page 4 of respondent's brief, the actual amount of 1934 accumulations was $34,200. more than the distribution to the petitioner, and of this amount $20,000., or over fifty-eight per cent. thereof, was due to payments which the trustees were required to make to petitioner's children. (See page 7 of Petition for Writ of Certiorari, herein.)

In the second place the rights to the accumulated income of the grantors in the cases cited by the respondent depended not so much upon "a contingency (such as the death of the grantor before the period of distribution)" as upon the exercise of the *grantor's dominion* over the trust property.

In *Kaplan* v. *Commissioner* (66 F. (2d) 401) the grantor, as sole trustee, had discretionary power either to pay the income to his wife or accumulate it. If he exercised his discretion and accumulated the income, and if he survived his wife, he had the further discretionary power either to continue to hold the accumulation in trust or to distribute it to himself. The disposition of the income was thus in his unfettered control.

> "As Kaplan named himself trustee, the large discretion given in the trust instrument to the trustee as to the accumulation and payment of income is attributable to him personally. By the terms of the trust that discretion can be exercised for his own possible benefit, within wide limits." (66 F. (2d) 402.)

In *Altmaier* v. *Commissioner* (116 F. (2d) 162), the grantor, together with his wife, had the discretion of terminating the trust at any time and cause the accumulated income to be paid to the grantor. The Court held that the fact that the wife's concurrence was required should be disregarded; thus holding, in effect, that the grantor, in his sole discretion, might at any time cause the accumulated income to be paid to himself.

In *Graff* v. *Commissioner* (117 F. (2d) 247), it was not even held that Section 167 (a) (1) (the only section upon which the respondent relies in this case) was applicable. The trust was revocable by the grantor with the consent of his wife. The Court held that the wife did not have a substantial adverse interest as to the accumulated income in question and that the said income was taxable to the grantor by virtue of Section 166 [1] and Section 167 (a) (2).[2]

From the foregoing it is apparent that in each of the cases cited by the respondent the decision was based on the fact that the disposition of the accumulated income was in the unfettered control of the grantor.[3] On the other hand in the case at bar, the petitioner had no control whatever over the disposition of the accumulated income.

---

[1] See pages 32 and 33 of Petition for Writ of Certiorari and Supporting Brief, herein.

[2] See page 33 of Petition for Writ of Certiorari and Supporting Brief, herein.

[3] *Graff* v. *Commissioner* (117 F. (2d) 247), was decided after the decision of the District Court herein (favorable to the petitioner). That the Court did not consider the decision of the District Court in the case at bar as in conflict with its own decision is apparent from the following:

> "We do not regard *Commissioner* v. *Branch*, 1 Cir., 114 F. 2d 985, or *Kent* v. *Rothensies*, D. C., 35 F. Supp., 291, in point as to the facts found here. If so they are not controlling."

Finally, even if it should be held that the three cases support the decision of the Circuit Court of Appeals below,[4] we submit that, if that be true, said cases are in conflict with the decision in *Commissioner* v. *Dean* (102 F. (2d) 699), and that this Court should assume jurisdiction in order to quiet the present confusion in the decisions of the several circuits. The fact that the *Dean* case was an interpretation of Section 162 (b) and that the decision below in the case at bar was an interpretation of Section 167 (a) does not, as the respondent suggests, make them any the less conflicting. The *Dean* case held that income accumulated and held on December 31 for future distribution to a named beneficiary if he were living on the succeeding January 3 was "held for persons whose identity could not be ascertained until the end of the administrative year", *i. e.*, until January 3. The decision in the case at bar holds that income accumulated and held on December 31 for future distribution to a named beneficiary if he be living on the June 30 and December 31 of the second year thereafter was held for such beneficiary.

[4] It is significant that while the three cases were cited in the respondent's brief below, the Circuit Court of Appeals does not mention them in its opinion. Obviously, the Circuit Court of Appeals below did not consider the three cases precedents for its decision.

II.

The writ prayed for should be granted because of confusion existing as to the meaning of the decision of this Court in *Helvering* v. *Clifford* (309 U. S. 331), which confusion is indicated by the respondent's announced intention to contend that the petitioner is taxable on the income of the trust here involved by virtue of Section 22(a)[5] of the Revenue Acts of 1932 and 1934.

The respondent correctly states in a footnote on page 6 of his brief that the Circuit Court of Appeals found it unnecessary to pass upon the applicability of Section 22(a) to the income of the trusts herein involved. He states, however, that he intends, if the petition herein prayed for is granted, to renew his contention that Section 22(a) supports the tax.

As the respondent intends to ask this Court to hold the petitioner liable under Section 22(a) and thus to extend the doctrine of *Helvering* v. *Clifford*, 309 U. S. 331, the question should be put at rest by this Court, particularly in view of the decisions of the Circuit Courts of Appeals for the First and Second Circuits in *Commissioner* v. *Branch*, 114 F. (2d) 985 and *Helvering* v. *Palmer*, 115 F. (2d) 368.

In the *Branch* and *Palmer* cases, the government contended that the income from trusts was taxable to the grantors under Section 22(a) under the *rationale* of the decision of this Court in *Helvering* v. *Clifford*, 309 U. S. 331. In each of the cases the Circuit Courts of Appeals decided to the contrary. In each of said cases the facts supported

---

[5] 47 Statutes at Large, Public Volume I, p. 178; 48 Statutes at Large, Public Volume I, p. 686, U. S. C. (1934 Ed.), p. 1039. See page 8 of Brief for the Respondent in Opposition, herein.

the government's contention far more than would the facts of the instant case.

Without burdening this Court with a detailed comparison of the several trusts, suffice it to say that in the *Branch* case, the grantor, without the concurrence of his co-trustees, who were absolved from liability for losses in connection therewith, had discretionary powers of sale, lease, partition and exchange of the trust property; to give options to purchase or lease; to sell for cash or on credit, to purchase from or sell to himself; to borrow money for the purpose of purchasing any investments which he might deem advisable and to pledge or mortgage the trust estate to secure such loans; to invest and reinvest without regard to the normal restrictions on investment of trust funds; to exercise rights of conversion, exchange or subscription in connection with any of the securities of the trust; to fill vacancies in the trustees; and to appoint additional trustees. The corpus of the trust was to revert to the grantor if he survived his wife. The grantor's wife had the power to revoke during the joint lives of herself and her husband.

In the *Palmer* case, the grantor, without the concurrence of his co-trustee (his wife, who was also the income beneficiary) had power to exercise all the powers vested in the trustees except that of adjusting the option price (or the formulae for determining the same) at which he had the right to buy the corpus of the trust. Included in the powers so vested in the grantor alone was the power to exercise freely and in his uncontrolled discretion, all the rights, powers and privileges appertaining to full and complete ownership of the trust property. The grantor had the right to name the successor of his co-trustee. The trust was to continue for a specified period of time after the death of the grantor's wife, whereupon the corpus was to be distributed to the grantor's issue.

On the other hand, in the case at bar, the only rights which the petitioner had (other than his rights as a co-trustee with a trust company) were (1) a power to veto a sale of any stock or other securities of the Atwater Kent Manufacturing Company, or of any reorganization thereof, or of any affiliated company, or of any other company of which the grantor owned the majority of the voting stock, (2) a power to compel the trustees to offer to sell to a person other than the grantor all or a part of the trust's holdings of Atwater Kent Manufacturing Company participating preferred stock[6] at the same price and on the same terms as he should have sold such person common stock of said company and (3) a power to compel the trustees to offer to sell to a person other than himself the trust's holdings of Atwater Kent Manufacturing Company preferred dividend stock at $100 per share, and on the same terms as he should have sold common stock of said company.

Conclusion.

The writ should be allowed.

Respectfully submitted,

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
THOMAS G. HAIGHT,
LEIGHTON P. STRADLEY,
MAURICE T. MOORE,
J. MARVIN HAYNES,
CHESTER J. McGUIRE,
GEORGE G. TYLER,
Counsel for Petitioner.

---

[6] The trusts actually owned no such stock.